

Editor's note: Reconsideration denied by order dated Jan. 23, 1975

CARL D. QUALMAN, ET AL.

IBLA 74-303

Decided November 26, 1974

Appeal from decisions of the Idaho State Office, Bureau of Land Management, rejecting applications for homestead entry, I-8155, I-8156, I-8157, I-8158, I-8159, and I-8160.

Affirmed.

1. Applications and Entries: Generally -- Homesteads (Ordinary): Lands Subject to -- Reclamation Lands: Generally -- Withdrawals and Reservations: Reclamation Withdrawals

An application to make homestead entry on land embraced in a first form reclamation withdrawal is properly rejected.

2. Homesteads (Ordinary): Generally -- Homesteads (Ordinary): Lands Subject to -- Homesteads (Ordinary): Settlement -- Reclamation Lands: Generally

No person shall be permitted to make homestead entry or settle upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage per entry and publicly announced the availability of water for irrigation.

APPEARANCES: Carl D. Qualman, Dallas C. Qualman, Ruth A. Wize, Carl D. Poen, Ronald R. Qualman, Roscoe A. Kellogg, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Each appellant 1/ filed an appeal from the April 17, 1974, decision of the Idaho State Office, Bureau of Land Management, rejecting his individual application to make homestead entry on lands in Secs. 26, 27 and 28, T. 1 S., R. 1 W., B.M., Idaho. The applications were filed on March 27, 1974. The cases were consolidated in the State Office decision since the issues involved were identical. The appeals to this Board involve the same issues, and, in fact, were identically worded. For convenience, they will be treated in a single decision.

The State Office decision rejected each application for the reason that the lands sought were withdrawn from public entry by a first form reclamation withdrawal for the Mountain Home Reclamation Project, by order dated January 28, 1952, pursuant to the authority of section 3 of the Act of June 17, 43 U.S.C. § 416 (1970). The decision stated that applications to enter reserved or withdrawn land must be rejected and cannot be held pending possible future availability of the land.

The decision also stated that under Executive Order No. 6910, November 26, 1934, all of the vacant, unreserved and unappropriated public land in the State of Idaho was temporarily withdrawn from settlement, location, sale or entry and reserved for classification pursuant to Section 7 of the Taylor Grazing Act of June 28, 1934, 43 U.S.C. § 315(f) (1970). Since this Executive Order is still in effect no settlement may be permitted in Idaho under the homestead or other public land laws until an entry has been authorized after classification under Section 7 of the Taylor Grazing Act.

Appellants claim, in essence, that the effect of the reclamation withdrawal was to remove the land from the application of the Taylor Grazing Act of June 28, 1934, particularly as to requirements for classification of lands. Since leases (special land use permits) for farming have been issued for the lands, appellants contend the land is available for homestead entry. Appellants further

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Roscoe A. Kellogg, I-8160

claim that they have "checked with the Ada County Commissioners, Idaho Water Resources Board, Bureau of Land Management, and the Bureau of Reclamation in regard to this land. They all feel this land should be kept as agricultural land."

Appellants further claim that water is available for the area through irrigation of a small part thereof by a private corporation. Appellants allege this opens the land for homestead entry. They apparently construe Section 3 of the Reclamation Act of 1902, 32 Stat. 388, 43 U.S.C. § 416 (1970), which authorizes the Secretary "* * * to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works * * *" as meaning that homestead entries may be made at any time upon lands withdrawn by the Bureau of Reclamation once water has become available.

Appellants are in error. The pertinent regulation, 43 CFR 2322.1-1, states,

After lands have been withdrawn under the first form they cannot be entered, selected, or located in any manner so long as they remain so withdrawn, and all applications for such entries, selection, or locations presented after the date of such withdrawal should be rejected and denied.

[1] The Department consistently has held that an application for withdrawn lands must be rejected and it will not be suspended pending restoration of the land. Paxton J. Sullivan, 14 IBLA 120 (1973); William F. Ringert, 12 IBLA 378 (1973); Robert M. Ford, 4 IBLA 321 (1972).

The mere presentation of evidence that the land involved is suitable for agricultural development, and that the Bureau of Reclamation had issued special land use permits for agricultural use on some of the lands does not alter the fact that at the time of filing of the applications in issue the land was in a first form reclamation withdrawal and not subject to homestead entry. See Curtis Wheeler, 8 IBLA 148 (1972).

[2] Appellants assert that land in each application to make homestead entry is excepted from the pertinent special land use permit issued April 1, 1974, by the Bureau of Reclamation, because the homestead applications were filed March 26, 1974. They reason that the mere filing of the homestead applications places them within the ambit of Article 4 of the permits, which excludes therefrom all land to which other rights have lawfully attached before the date of the permit. Appellants are in gross error. The mere

filing of an application to make homestead entry on land withdrawn for reclamation purposes creates no rights in the applicant. Section 5 of the Act of June 25, 1910, 43 U.S.C. § 436 (1970), provides that no [homestead] entry shall be made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage per entry and publicly announced the availability of water for irrigation.

As the Department stated in Roberts v. Spencer, 40 L.D. 306, 309 (1911):

The evident purpose of this legislation was to cure a defect in the reclamation act allowing homestead entries to be made of arid lands within irrigation projects in advance of the supply of water, which could not be successfully cultivated in their desert condition. It was well known that it was impossible for the settler to live on the land and support his family without irrigation, and in many cases, great distress resulted in the effort to maintain residence upon such lands. To avoid the evil consequences that would inevitably result from the allowance of entries upon lands within irrigation projects in advance of sufficient progress in the construction of the works to reasonably assure a sufficiency of water for the irrigation of the land, the Department from time to time had been, prior to the passage of said act of June 25, 1910, importuned to withhold such lands from entry of every character as a matter of public policy and in the interest of sound administration until water for the irrigation of the land was available, which could not be entertained, because of the express provisions of the reclamation act allowing entries under the homestead law of lands susceptible of irrigation from the project. See Instructions (33 L.D. 104).

Quoted with approval, M. G. Johnson, 78 I.D. 107, 109 (1971); Solicitor's Opinion, M-36433 (April 12, 1957).

Section 5 of the Act of 1910, supra, precluded further allowance of ordinary homestead entry on a Federal reclamation project. Only a reclamation homestead entry was thereafter to be allowed, and then only after proper notice of availability of water and establishment of farm units. See Solicitor's Opinion, M-36433, supra.

As there has been no announcement by the Secretary of the Interior as to availability of irrigation water for any of the lands in issue, nor establishment of "farm units" on these lands, they are not open to entry and the State Office properly rejected each application in issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Joseph W. Goss
Administrative Judge

